

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2116

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES;
RUSSELL OSWALD, individually and in his capacity as
Commissioner of the New York State Department of
Correctional Services; THE NEW YORK STATE CIVIL SERVICE
COMMISSION; ERSa POSTON, individually and in her
capacity as President of the New York State Civil
Service Commission and Civil Service Commissioner;
MICHAEL N. SCELSE and CHARLES F. STOCKMEISTER, each
individually and in his capacity as Civil Service
Commissioner,

Defendants-Appellants,

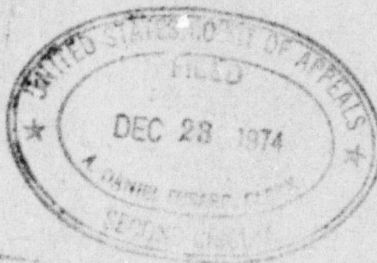
-and-

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES



JACK GREENBERG
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
Suite 2030
New York, New York 10019
Attorneys for Plaintiffs-
Appellees.

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THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.,

Defendants-Appellants,

-and-

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

This case challenging state civil service examinations as being racially discriminatory is here on appeal from a decree of the District Court for the Southern District of New York (Lasker, J.) entered July 31, 1974, in accordance with an opinion dated April 1, 1974.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court's finding that examination No. 34-944 for the position of Correction Sergeant (Male) had a discriminatory impact upon Blacks and Hispanics must be upheld as not clearly erroneous?

2. Whether the finding below that defendants did not demonstrate the job-relatedness of said examination was not clearly erroneous?

3. Whether the definition of a class composed of all Black and Hispanic Correction Officers or provisional Correction Sergeants who failed examination 34-944 or ranked too low to be appointed was not clearly erroneous?

4. Whether the District Court's grant of injunctive relief was not an abuse of discretion in light of the discriminatory impact and non-job-relatedness of examination No. 34-944 and previous examinations?

5. Whether the District Court's award of counsel fees to plaintiffs must be upheld as not beyond its power and not an abuse of discretion?

6. Whether this Court should dismiss this fully litigated action and deny relief from unconstitutional practices because certain allegedly necessary parties were not joined?

STATEMENT OF THE CASE

This action for declaratory and injunctive relief was filed April 10, 1973 by Edward L. Kirkland and Nathaniel Hayes, Black Correction Officers provisionally appointed to the rank of Correction Sergeant,^{1/} against the New York State Department of Correctional Services, its Commissioner, the New York State Civil Service Commission and its three Commissioners. The complaint challenged the legality, under 42 U.S.C. §§1981 and 1983 and the Fifth and Fourteenth Amendments to the Constitution of the United States, of Civil Service examination 34-944 for promotion to the position of Correction Sergeant (Male) on the ground that it had a disproportionately adverse impact upon Black and Hispanic candidates and could not be shown to be job-related (A. 7-24)^{2/}. That day the District Court entered a Temporary Restraining Order restraining defendants-appellants (hereafter, "defendants") from "making any permanent appointments to the position of Correction Sergeant (Male); and from terminating or otherwise interfering with the provisional appointments of the named

^{1/} A third plaintiff, the Brotherhood of New York State Correction Officers, Inc., withdrew at the commencement of the trial.

^{2/} This form of citation is to pages of the Appendix.

plaintiffs and those members of the class who are provisional Correction Sergeants (Male)" (A. 33-37). By modification and stipulation said Temporary Restraining Order was extended until the entry of a decision on the merits (A. 66-68, A.69-74).

Plaintiffs-appellees (hereafter "plaintiffs") filed an amended complaint June 22, 1973 alleging that Sergeant examinations administered prior to 1972 had a discriminatory impact on Blacks and Hispanics and could not be shown to be job-related (A. 28-31). Defendants answered the complaint and amendment thereto on July 19, 1973, denying plaintiffs allegations (A. 86-97).

After extensive discovery, the action came on for a six-day trial before the Honorable Morris E. Lasker.

In its April 1, 1974 opinion (A. 148-200), the District Court found that plaintiffs' showing of the differential impact of examination 34-944 was "amply established" (A. 164), that the construction of the examination was characterized by a "lack of professionalism" (A. 180), that "the slavish imitation of earlier examinations . . . indicates an alarming lack of independent thought about how to assure that 34-944 was job-related" (A.181-182), and that "positive evidence of job-relatedness is conspicuous by its absence" (A. 184). As to past examinations, the court found that while there was evidence of discriminatory

impact, there was no evidence as to job-relatedness (A. 181). The Court found that plaintiffs had demonstrated the existence of a class composed of all Black and Hispanic Correction Officers or provisional Correction Sergeants who failed 34-944 or who passed but ranked too low to be appointed (A. 187). The Court declared examination 34-944 unconstitutional and enjoined defendants from making appointments based on its results (A.188-89), but deferred decision on the extent of affirmative relief to give defendants an opportunity to address themselves to plaintiffs' recommendations (A. 189-90). The Court awarded plaintiffs reasonable costs, including attorneys' fees, in an amount to be determined after further documentation (A. 196).

Subsequent to rendering of the court's opinion, on April 22, 1974, Albert M. Ribeiro and Henry L. Coons, provisional Sergeants who would have been appointed permanent Sergeants on the basis of their performance on examination 34-944 effective April 12, 1973 but for the Temporary Restraining Order,^{3/} moved to intervene as parties defendant (A. 201). They were granted intervention on condition that they not seek to relitigate any

^{3/} The Temporary Restraining Order was modified April 11, 1973 to permit defendants to give provisional appointments as Sergeants to a group of Correction Officers who were scheduled to receive permanent appointments on April 12, 1973 (A. 66-68). Intervenors were appointed pursuant to said order.

matter which they might have theretofore litigated had they been parties from outset (A. 230-31). Intervenor's motions to maintain a class action and to add as parties defendant all persons who passed examination number 34-944 were denied (A. 231-34).

On July 31, 1974 the District Court entered a decree (1) enjoining defendants from in any way acting upon the results of Examination No. 34-944; (2) mandatorily enjoining defendants to develop a new selection procedure validated in accordance with the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. §1607; (3) requiring that such validation be by means of empirical, criterion-related validation techniques insofar as possible; (4) providing for interim appointments to the position of Correction Sergeant (Male) upon application to the Court; (5) mandatorily enjoining defendants to make all appointments on the basis of one Black or Hispanic for each three whites so appointed until the combined percentage of Black and Hispanic persons in the rank of Correction Sergeant (Male) is equal to the combined percentage of Blacks and Hispanics in the rank of Correction Officer (Male). The Court retained jurisdiction to supervise the decree and to determine the reasonable value of plaintiffs' attorneys' services (A. 241-45).

STATEMENT OF FACTS

A. Absence of Blacks and Hispanics from
the Supervisory Ranks of the Department of Correctional Services

In the Correction Officer series of the New York State Department of Correctional Services, the entry level position is Correction Officer. Promotions are made to successive supervisory positions of Sergeant, Lieutenant, Captain, Assistant Deputy Superintendent, Deputy Superintendent and Superintendent on the basis of a series of written examinations (A. 1327-29).

Candidates for promotion from Correction Officer to Correction Sergeant must take a written exam prepared and administered by the New York State Department of Civil Service. The passing score is established by the Department of Civil Service, after the examination has been scored, at a level which will insure that an adequate number of people will be available to fill vacancies (A. 578). By state law, however, the passing score may not be set higher than 70% (A. 760).

Those who pass are placed on a ranked eligible list on the basis of their scores after adding seniority and veteran's preference credits (where applicable). After eligibles have

been canvassed to ascertain acceptors for geographic areas where correctional facilities are located, candidates are selected from eligible lists in rank order, subject to the One in Three rule (A.1268- 69). In the event that an eligible list is exhausted before publication of a new list, provisional appointment of Sergeants are made on the basis of 1) ability as a Correction Officer, 2) evaluations from the superintendent and supervisors and 3) leadership ability and empathy with the inmate population (A. 1269-1278).

Blacks and Hispanics have been almost totally excluded from the supervisory ranks of the Department of Correctional Services. As of May 1, 1973 there were no Blacks or Hispanics holding permanent appointments as Correction Sergeants (Male) (A. 1448). Of the 237 men in the combined classifications of Sergeant, Lieutenant and Captain, only two, Captain David Harris, and Lieutenant Clayton Hill, were Black; none was Hispanic (A. 286, 393-95, 1447). As of January 1, 1973 there were 85 provisionally appointed Sergeants and 122 permanent Sergeants in the Department's Correctional facilities. ^{4/} Ten provisional Sergeants were Black; none was Hispanic (A.1447).

^{4/} All ten would have been returned to the rank of Officer on April 12, 1973 but for the Temporary Restraining Order (A. 1277-79).

While the numbers of Assistant Deputy Superintendents, Deputy Superintendents and Superintendents is not in the record, persons serving in state correctional facilities for up to twelve years could recall no Black supervisors other than Hill and Harris (A. 268, 395, 473-74, 533). Defendants presented no evidence to the contrary.

B. The Impact of the Sergeant Examinations
 On the Promotion of Blacks and Hispanics
 to Supervisory Ranks

October 14, 1972, the Department of Civil Service administered promotional examination 34-944 for the position of Correction Sergeant (Male). 1,432 men took the examination and 406 passed (PX-5)^{5/}. Of 1,263 whites who took examination 34-944, 389 or 30.8%, received passing scores;^{6/} of 104 Blacks, 8 or 7.7%, passed; of 16 Hispanics

^{5/} As the trial court noted (A. 197 n.3), while the eligible list promulgated on the basis of the results of examination 34-944 (PX-5) which is not reproduced in the Appendix) indicates that 1432 took the examination, the computer display (A. 1343-48) shows a total of only 1,383 Black, Hispanic and white candidates. Presumably, the discrepancy is attributable to "others", e.g., Asian-Americans or Native Americans, or persons whose race/ethnicity was unknown.

^{6/} The raw passing score was 53 (70% of 75, the number of items on the exam).

2, or 12.5%, passed (A. 154, 736, 1343-48)^{7/}. Defendants admitted the statistical significance of these differences (A. 736-37).

The passing score serves more to regulate the numbers on the eligible list than to determine who is qualified to be a Correction Sergeant (A. 578). In assessing the discriminatory effect of the exam, far more meaningful than pass-fail statistics is evidence of the relative numbers of whites, Blacks and Hispanics who took the exam and the number who scored high enough to be likely to be appointed. In April 1973 the Department of Correctional Services made^{8/} 87 provisional appointments from the eligible list established on the basis of examination 34-944. One of the appointees was Black (A. 1279-80). On May 29, 1973 the Department indicated that it planned to appoint an additional 40-60 sergeants over the next two years. Thus, through May 1975

^{7/} PX-33 (A. 1449), which shows 383 whites having received passing scores, is in error. PX-12, pp. 1 and 2 (A. 1343-44) were changed to reflect the fact that one candidate previously recorded as white was Black, but pp. 5 and 6 (A. 1347-48) showing test performance of whites was not changed. Therefore, it shows that 1,264 whites took the exam, but should show 1,263 and shows that 390 passed but should show 389.

^{8/} See n.3 supra.

a maximum of 147 Sergeants would have been appointed. Another Sergeant's exam was planned for 1974 (A. 1460) and the eligible list from examination 34-944 would have expired several months thereafter, in 1974 or early 1975 (A. 197-98 n.5).

The display of the results of examination 34-944 shows that 157 whites, 2 Blacks and no Hispanics attained scores of 57 or above (A. 1343-48). Nothing in the record indicates that this pool of 159 eligibles would not be sufficient to provide the 127-147 sergeants to be appointed from this list. Thus, while 157, or 12.4% of the whites who took the test were likely to be appointed, only 2, or 1.9% of the Blacks, and none of the Hispanics who took the test were likely to be appointed. As the court below noted, these results would lead to the appointment of whites at 6.5 times the rate for Blacks, and completely bar the appointment of Hispanics (A. 155).

The discriminatory impact of the 1970 Sergeants examination, No. 34007, was even greater; indeed it was absolute. Of the 997 whites who took examination 34007 and were still employed on January 1, 1973, at least 94 or 9.4% passed; of the 46 Blacks and Hispanics who took the examination and were still

employed on January 1, 1973, none received a passing score
9/
(A. 1436-43).

Although there are no data in the record with respect to pre-1970 Sergeant examinations, the racial composition of present supervisory personnel, taken with undisputed testimony that the only minority supervisors in the last twelve years were two Blacks who are still the only minority supervisors, creates a powerful inference that very few Blacks, and probably no Hispanics, ever passed the examinations, or more importantly, scored high enough to be appointed.

C. Examination 34-944

Examination 34-944 was a written examination consisting of five subtests of 15 items each. Each subtest was designed to test for knowledge, skills and abilities (K, S, & A's) in one of the following areas: Laws, rules and regulations; modern correctional methods, using good judgment, preparing written material; and supervision (A. 1332-1336, 1353).

While there are certain areas of ambiguity, the record indicates generally the manner in which examination 34-944 was constructed. In May, 1972, the Department of Correctional

9/ The passing score on the 1970 Sergeant examination is not in the record. The above data is based upon the assumption that the passing score was the maximum allowed by state law, 70% of 90 (the number of items on the exam, see PX-43, page 2) or 63. Even if the passing score were lower, the fact remains that the list was exhausted without any Blacks or Hispanics having been appointed therefrom.

Services notified the Department of Civil Service that a substantial number of provisional Correction Sergeants were about to be appointed, and that it would be necessary to prepare a new Sergeant examination (A. 1349). On June 1, a "scope conference" was held, attended by personnel from the two departments. It was determined that the scope of examination 34-944 would be the same as for the 1970 examination, except that a subtest on preparation of written reports would be substituted for one on interpretation of written materials (Id.). On July 26, 1972, three officers from Correctional Services, (then) Lieutenants Ciuros, Sperback, and Harris, met with personnel from Civil Service and were asked to prepare items on rules and regulations, modern correctional methods, and judgment (A. 1339). The three Corrections consultants were directed to draft questions from their own work experience (A. 787). The items on these three subtests were also worked on by three examiners in Civil Service, Kenneth Siegal, Mrs. Walters and Mr. Bouldin (A. 602). The items on supervision and report preparation were assigned for preparation to a group in Civil Service which prepares such tests for a variety of occupations (Id.) During the period that the items were being prepared, KS&A statements (A. 1332-36), which were supposed to serve as subtest descriptions and

guidelines for the preparation of test items (A. 901), were also being prepared (A. 902). The KS&A's for the subtests on rules and regulations, modern correctional methods and judgment were drafted by Mr. Siegal, Mrs. Walters and Mr. Bouldin; those for subtests on supervision and report preparation by the special examiners who prepared those subtests (A. 602).

D. Previous Sergeant Examinations

Sergeant examinations have for many years been prepared by the same process by which examination 34-944 was developed. (A. 624).

The fact that (a) the scope of every examination since 1964 was virtually identical (A. 1469), (b) the class specifications for Correction Sergeant were unchanged since 1962 (A. 1474-84), and (c) prior examinations were consulted in preparing examination 34-944 (A. 889) lead the trial court to conclude that pre-1972 Sergeant examinations were similar to examination 34-944 (A. 181-82).

E. The Plaintiffs and Other Witnesses

Plaintiffs Kirkland and Hayes served as Correction Officers at Ossining from 1962 and 1961, respectively, until August 1972, when they were provisionally appointed to Correction Sergeant (A. 371, 374, 446, 449). Each has taken and failed

the Sergeant examination four times. According to the Assistant Deputy Superintendent at Ossining, their performance as provisional Sergeants was satisfactory and there was no reason they were not qualified to be sergeants other than that they failed the examination (A. 320-21). The Superintendent wrote letters to plaintiffs commending them for "cooperation, diligence and dedicated performance" as provisional Sergeants, stating that he would recommend them for permanent appointment at Ossining or any other institution (A. 1454-55).

Four other black provisional Sergeants and one Black Correction Officer testified that they had taken the Sergeant examination as many as four times and had either failed or had passed with grades too low to be appointed (A. 282, 349-50, 436-37, 518, 543). There was no evidence that they had performed their duties other than satisfactorily.

ARGUMENT

- I. THE DISTRICT COURT WAS CORRECT IN HOLDING EXAMINATION 34-944 UNCONSTITUTIONAL IN THAT IT EXCLUDED MINOR TIES FROM APPOINTMENT AND WAS NOT SHOWN TO BE JOB-RELATED

A. The Applicable Law

There is a well-defined body of law which clearly articulates the governing standards applicable to the issues presented in this case.

The leading cases in this Circuit are Chance v. Board of Examiners, 458 F.2d 1167 (1972), aff'g 330 F.Supp. 203 (S.D.N.Y. 1971) ("Chance"); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (1973), aff'g in part and rev'g in part 354 F.Supp. 778 (D. Conn. 1973) ("Bridgeport"); and Vulcan Society of the New York Fire Department, Inc. v. Civil Service Commission of the City of New York, 490 F.2d 387 (1973), aff'g in part and rev'g in part 353 F.Supp. 1092 (S.D.N.Y. 1973) ("Vulcan"). The rule established by these authorities is that in a case such as the instant one, if plaintiffs show that an examination has had a disproportionately adverse impact upon a racial or ethnic group, defendants must meet a heavy burden of justifying the use of the test by establishing that performance on the test bears a demonstrable relationship to the ability to perform the job for which it is used.

The District Court, in holding examination 34-944 unlawful, expressly followed these decisions (A. 150-51) and correctly applied the standards laid down therein.

B. The District Court's Ruling That Examination
34-944 Had A Disproportionately Adverse Impact
Upon Minorities Is Not Clearly Erroneous

Plaintiffs proved, and the trial court found, that whites passed examination 34-944 at a rate four times that of Blacks and 2.5 times that of Hispanics. Defendants conceded the statistical significance of these disparities (A. 154). More significantly, plaintiffs demonstrated, and the court found, that whites scored high enough to be appointed at $6\frac{1}{2}$ times the rate for Blacks and that no Hispanics scored high enough to be appointed (A. 155). Thus, the disproportionately adverse impact which examination 34-944 had on Blacks and Hispanics was substantially greater than that held sufficient to establish a prima facie case of discrimination in Chance, Vulcan and Bridgeport (A. 155).

Defendants, however, contend that although examination 34-944 was given state-wide to provide a state-wide pool of Correction Sergeants, the District Court's reliance on state-wide pass-fail data was clearly erroneous. Instead, they argue, the Court should have compared white and minority passing rates facility-by-facility. Defendants reason that mean scores of both

whites and minorities were lower at Ossining and Greenhaven (where the minority candidates are concentrated) than at other facilities, indicating that the overall disparity is the result of "facility effect," not ethnicity, and that the "variable" of "facility effect" can only be "screened out" by comparing white-minority performance at each facility (Br. 36-46).^{10/} Such a comparison, defendants maintain, would show a "statistically significant" difference in passing rates only between whites and Blacks at Ossining. Judge Lasker rejected this analysis as being premised on factually erroneous assumptions, incorrect as a matter of law, and irrelevant (A. 155-62). He found the analysis to be factually flawed in that (a) whites received statistically significantly higher mean scores than Blacks and Hispanics facility-by-facility as well as state-wide (A. 158-59, 1934), and (b) there were "significant" disparities in the passing rates of whites compared to Blacks and Hispanics facility-by-facility as well as state-wide (A. 159-61, 1449). Defendants take issue with Judge Lasker's application of the term "significant" to passing rate disparities which, while substantial, are not, they contend, "statistically significant" (Br. 43). However, defendants' insistence on statistical significance is ill-founded. As Judge Friendly observed in Vulcan

^{10/} This form of citation is to pages of appellants' brief.

in holding that Judge Weinfeld's finding of the racially disproportionate impact of the fireman's examination was not clearly erroneous,

It may well be that the cited figures and other more peripheral data relied on by the district judge did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that they should ... We must not forget the limited office of the finding that Black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

490 F.2d at 393. Accord: Boston Chapter, N.A.A.C.P., Inc. v. Beecher, No. 74-1067 (1st Cir. Sept. 15, 1974)

[I]t can be argued that a showing of significant disproportionality in minority employment, coupled with even minimal proof of a higher minority failure rate, is enough to shift to the Division of Civil Service the burden of justification.

Slip. Op. at 5-6.

In any event, there is no dispute that the disparity in overall pass-fail rates is statistically significant and, as Judge Lasker held, the resulting racial/ethnic classification, which establishes plaintiffs' prima facie case, cannot be rebutted by defendants' attempt to explain this classification by "facility effect" (A. 161-62). The classification requires that defendants justify the test. Bridgeport, supra, 354 F. Supp. at 785-86; Vulcan, supra, 360 F.Supp. at 1272; Castro v. Beecher, 459 F.2d 725, 730-31 (1st Cir. 1972).

Defendants also claim that the court below erred in finding that plaintiffs had established a prima facie case as to the examination as a whole, and should have compared white-minority performance subtest-by-subtest. Had it done so, the argument goes, it would have found that as to one of the five subtests there was no significant difference in performance (Br. 47). The point of this argument is puzzling since (a) defendants reject the notion that they should re-grade the examination and make appointments on the basis of this one subtest (Br. 30, footnote), and (b) defendants concede that failure to prove job-relatedness on any one of the other four subtests would invalidate the entire test (Br. 48, footnote). Carried to its logical end, defendants approach would require question-by-question comparison of white-minority performance. Defendants, however, admit that it is "self evident" that in terms of the impact of the disparity of scores on Blacks and Hispanics, the only score that means anything is the score on the test as a whole (A. 946).

As Judge Lasker correctly held, defendants' approach is unwarranted in law and in logic (A. 162-24).

C. The District Court's Finding That Defendants
Did Not Meet Their Burden Of Demonstrating
The Job-relatedness Of Examination 34-944
Must Be Upheld As Not Clearly Erroneous

The Court below devoted 23 pages of its opinion (A. 164-87) to a detailed, carefully documented discussion of the job-relatedness of examination 34-944. Its findings of basic fact are amply supported by the record, and its finding of ultimate fact, to wit, that "the probabilities in this case [of the job-relatedness of the examination] run heavily against defendants" and, therefore, defendants failed to meet their burden (A. 186-87), was arrived at by the application of legal standards approved by this Court in Chance, Vulcan, and Bridgeport.

Defendants contend that examination 34-944 met established standards for content validity (Br. 53). The Court below correctly summarized the relevant legal and professional standards for content validity as follows:

[T]o survive plaintiffs' challenge, 34-944 must be shown to examine all or substantially all the critical attributes of the sergeant position in proportion to their relative importance to the job and at the level of difficulty which the job demands (A. 169).

See Vulcan, supra, 360 F.Supp. at 1274 and 490 F.2d at 395; Bridgeport, supra, 482 F.2d at 1338.

Following the approach taken by Judge Weinfeld in Vulcan, which approach was described with approval by Judge Friendly, 490 F.2d at 395, Judge Lasker, rather than "burying himself in

a question-by-question analysis" of examination 34-944 to determine if the test had content validity (id.), placed primary emphasis on the process by which it was created. Concluding that "the procedures employed in constructing examination 34-944 do not conform to professionally acceptable and legally required standards" (A. 184), he proceeded to inquire whether, despite the inadequacy of the procedures by which the examination was constructed, it was in fact related to the job of Correction Sergeant. He found that "positive evidence of job-relatedness is conspicuous by its absence" (A. 184).

1. Examination 34-944 Was Not Prepared In A Manner Consistent With Content Validity

a. No job analysis was performed.

Plaintiffs' expert testified, and the District Court agreed, that fundamental to the construction of any examination purporting to have content validity is a job analysis of the position's duties which will enable examiners to formulate questions capable of measuring the necessary characteristics (A. 171-72, 1116, 1122). Thus, no claim of content validity can be supported without a job analysis or detailed job description giving the examination preparer adequate information from which to select questions representing a reasonable sample of the work required for the job. Chance, supra, 458 F.2d at 1174, Vulcan, supra, 360 F.Supp. at 1274.

Defendants' witnesses testified that job analysis was a process that need not be reduced to writing but can exist in the minds of the test constructors, that there was no job analysis for the position of Correction Sergeant in documentary form (A. 599-600, 919-20), but that the "job audit" (A. 1516-95) KS&A statements (A. 1332-36), class specifications (A. 1327-29) and rule book (DX-0) constitute a job description of the job of Correction Sergeant (A. 599). The court below rejected these contentions. It found that these documents "do not even approximate a professionally adequate job analysis", that what existed in the minds of the test constructors was "unproven" or "unimpressive", that the reliance of the test constructors upon the purported job analysis was "largely established" and that the "inevitable inference, is that no adequate job analysis was performed" (A.173).

The job audits (A. 1516-95) purport to be descriptions of what Correction Officers were observed to be doing in several facilities (A. 174, 589). There is not a shred of evidence about the persons who conducted the audits -- their qualifications as either corrections experts or test construction experts -- or about any guidelines or procedures they followed in making the audits (A. 175).^{11/} The record does show that the audits were conducted not with test construction in mind, but rather for the purpose of determining whether various

^{11/} Defendants' expert testified that the job analysis process must be designed by a psychometric expert (A. 1046, 1048).

jobs in the Correction Officer series ought to be upgraded for Civil Service purposes (A. 174, 590, 1330-31)^{12/}.

Neither the people who took the auditors around the facilities nor the auditors themselves wrote the examination (A. 175, 595).

The audits are devoted primarily to a description of the duties of Correction Officers, not Sergeants (A. 175). They give no indication of the relative importance of various tasks performed by or skills required of a Sergeant, and no hint of the degree of competency required in regard to each skill, both essential components of job analysis (id.).

The job audits were conducted in the Spring of 1970 (A. 597-98). Kenneth Siegal, who was responsible for preparation of examination 34-944, testified that the job of Sergeant changed substantially between that time and October 1972, when examination 34-944 was given. (A. 174-75, 769).

Even if, in the face of all of the above, it were determined that the job audits did constitute evidence of an adequate job analysis of the job of Correction Sergeant as it existed in October 1972, defendants' contention that

^{12/} That the goals of a reclassification study might be inconsistent with those of a job analysis for test construction purposes is demonstrated by the fact that while the Sergeant's job was reclassified to the grade of 17 (A. 800), the plan for the supervision subtest called for questions appropriate for levels 10-14, and the plan for the report writing subtest called for questions appropriate for an entry level investigative position (A. 199, n. 12, A. 1335).

examination 34-944 was constructed in a manner consistent with content validity must be totally disregarded for the simple reason that, as the District Court found, defendants did not consult the job audits in the course of preparing the test items (A. 175, 903-04).

The lower court found that the other documents relied upon by defendants as parts of a job description fared no better: the class specifications (A. 175 - 78) contain no information useful for test construction (A. 175-76); the KS&A statements (A. 1332-36) are irrelevant, both because they are so lacking in detail and because they were not in fact used in preparing the examination (A. 176-77, 585, 902); and the rule book (DX-0) while it contains information which may be important to the job, is "obviously" not part of a job analysis (A. 177).

As the District Court found, the record does not establish that the persons who constructed the exam possessed the kind of knowledge that would make them "living job descriptions" (A. 178, 599). Of the three persons from the Department of Corrections only one, Captain Hylan Sperbeck testified. Captain Sperbeck provided 14 of 75 items on Examination 34-944 (A. 982). His qualifications as a Corrections expert, or an expert with respect to the Sergeant job, are that he started

as a Correction Officer in 1957, became a Sergeant in 1968, a Lieutenant in 1972 and Captain in 1973 (A. 974). Since March 1970, he has been head of the Training Academy (id.). Between March, 1970 and September 1972, when preparation of Examination 34-944 was completed, the only opportunities he had to observe the Sergeant job, which had changed substantially in that period (A. 769, 1460), were during five or six weekends spent at Greenhaven and four days at Attica. The qualifications of the other two men from the Department of Corrections, Ciuros and Harris, are not in the record. Defendants' expert testified however, that line officers with substantial experience in the job would not necessarily be subject matter experts, that such experience was highly desirable, but that such a person might not have developed the depth of understanding that would make him a subject matter specialist (A. 179, 1049). Plaintiffs' expert, Dr. Richard Barrett, pointed out that people who are too close to a job sometimes are unable to see what is truly important, and that defendants' subject matter experts had apparently not studied the job from the point of view of constructing a test (A. 1134). Of the three persons from Civil Service who worked with Corrections personnel on the subtests on rules, correctional methods, and judgment, only one, Kenneth Siegal, testified. His knowledge of the Sergeant position was limited to what he might have derived from an

examination of job audits, class specifications, tests, training manuals, prior examinations, and a visit to Coxsackie, where he spent one or two hours conferring with Sergeants (A. 179, 755-57, 776-83, 888). Similarly, defendants did not call as witnesses the persons who prepared the subtest on supervision and preparation of written reports, which constituted 40% of the examination, and there is no evidence of their qualifications as either subject matter or test construction experts. The testimony shows, however, that the persons who prepared these two subtests had no contact with Corrections personnel (A. 179, 504).

The District Court found not only that the record does not establish that the knowledge and qualifications possessed by the test constructors constituted a job analysis, but that "a contrary inference is warranted" (A. 180).

The conclusion of court below that defendants had not performed an adequate job analysis (A. 180) is clearly substantiated by the record.

- b. The type of examination, its scope, the weight of the subtests and the pass-point were not determined in a manner consistent with content validity.

That examination 34-944 was not prepared in a manner consistent with content validity is further evidenced by the "lack of professionalism" which characterized the way in which

the scope of the examination, the method of evaluation (i.e., a written exam as the sole measure), the number of items on each subtest, and the cut-off score were determined (A. 180).

At last since 1964, the promotional examination for the Sergeant position has been a written multiple-choice test (A. 1469). Kenneth Siegal testified that the decision to give a written test was "a decision of history" (A. 933). The Training Course Textbook used by the Civil Service Commission states that "[a] determination to use a written test, however, should be based on a conscious decision that the KS&A required on the job can best be measured by a written test (A. 1728). Plaintiffs' expert testified that very rarely is only one procedure, such as written examination, used in selection, and that where it is, it is inappropriate to do so (A. 1161-62). While performance ratings may be used as part of the promotional process (Civil Service Law §52(2); A. 907-08), here they were not (A. 617-18, 908, A. 180-81).

Like the decision to rely exclusively on a written examination, the court below found that the determination of the scope and organization of the exam was merely a "slavish imitation of earlier examinations which ... in this case indicates an alarming lack of independent thought about how to assure that 34-944 was job-related (A. 181-82).

For an examination to be content valid, it must consist of a representative sampling of those knowledge and skills which are deemed critical to successful performance of the job being tested for (A. 1114, 1763). Despite the fact that, as Kenneth Siegal recognized, the Sergeant's job had changed significantly in the last ten years, indeed in the last two years, (A. 769, 936), the fact is that the scope of the 1972 examination was identical to that of the 1964, 1968 and 1970 tests, except that some examinations covered interpretation of written materials in lieu of or in addition to preparation of written reports (A. 936, 1469). As the District Court found, this similarity was the result of the test planners' heavy reliance on prior scope statements (A. 182, 766-67, 895).

The relative weight given to each critical element of job performance is related to the importance of a representative sampling of the various elements. The portion of the examination devoted to measuring a particular group of knowledges, skills and abilities must bear some relation to their importance in performing the job. Samuel Taylor, who has overall responsibility for the construction and validation of Civil Service tests, assumed that the persons constructing

examination 34-944 made a conscious determination that each of the five subtests was equally important (A. 613). But in fact 15 items were used on each subtest only because using the same number of items made it easier to do certain types of analyses and Civil Service always works on the basis of 15 questions per subtest (A. 802-03, 936). Indeed, in the absence of a job analysis which states the relative importance of various skills and knowledges, it would have been impossible to construct the examination on any basis other than guess-work (A. 183).

The fact that 60% of the items on the Sergeant exams were also on the Lieutenant exam (A. 771-72, 1353) further points up defendants' failure to tailor examination 34-944 to the job for which it was testing (A. 183).

The District Court found that "the decision to establish the passing score of 70% subordinates the goal of job-relatedness to that of administrative convenience" (A. 183). The Civil Service training course textbook states:

"We have seen that the validity of a test is related to the pass point selected . . .

A. Objectives in Setting a Pass Point

1. We want to set the passing point so that a high percentage of those who pass are

competent to do the job and a low percentage of those who pass are incompetent to do the job.

2. We also want to set the passing point so that relatively few of those competent to do the job fail the test and most of those who fail are incompetent to do the job." (A.1767).

Plaintiffs' expert witness expressed the same view (A. 1118-19, 1161-62). Samuel Taylor and Siegal both testified that the pass point on examination 34-944 was set at the maximum permitted by law (A. 760); and that the decision to do so was made after the examination was scored, on the ground that such a passing score would create a pool of passing candidates sufficient to meet the needs of the Corrections Department (A. 616, 760-763). Taylor admitted that the function of the passing score was more to regulate the number of people who would be eligible for the job than to indicate whether or not a candidate is qualified. The court below found that this approach "departs from the requirement, imposed by law, that such decisions be made so as to further the paramount goal of job-relatedness " (A. 184).

2. Defendants Have Not Shown Examination 34-944 To Be Job-Related.

Having found that the preparation of examination did not conform to professionally acceptable or legally required standards, the court below proceeded to consider whether the examination was nevertheless in fact related to the Sergeant job. Far from finding convincing evidence of job-relatedness, as required by the sliding scale approach of Vulcan, supra, 490 F.2d at 396, Judge Lasker found that "positive evidence of job-relatedness is conspicuous by its absence" (A. 184).

Defendants' expert refused to testify that the exam was job-related (A. 1046). Plaintiffs' expert gave his opinion (1) there had been no showing that the test was job-related and (2) there was substantial reason to doubt that the test was in fact valid (A. 1132-33).

Witnesses for both sides testified that there were a substantial number of questions about laws, rules and regulations that a Sergeant would have no occasion to apply (A. 365-67, 369-70, 789, 1010). Dr. Barrett testified that the subtest on laws, rules and regulations (A. 1356-58, Nos. 1-15) seemed to deal with matters that were trivial or had nothing to do with a Sergeant's job (A. 1140-41). He also

testified that to the extent that a test contains items which a person would not have to apply, it cannot be claimed to have content validity (A. 1141-42). With respect to the subtest on modern correctional methods (A. 1358-60, Nos. 16-30), Dr. Barrett pointed out certain specific defects in some of the items and possible inconsistencies between items (A. 1146-50). As to the subtest on supervision (A. 1360-62, Nos. 31-45), Dr. Barrett pointed out that there is no evidence that people who follow one set of principles are better supervisors than persons who follow another. Furthermore, the supervisor-subordinate relationship is so complex that it cannot be tested with the type of items on the subtest (A. 1151). With respect to the report preparation subtest (A. 1363-67, Nos. 40-50), five of the items were poorly constructed in that they put the test-wise taker at an advantage (A. 1156-58). Dr. Barrett testified that the fifth subtest, on judgment (A. 1369-71), was poorly constructed, principally because persons do not necessarily act in judgment situations the way they say, on examination, that they would act (A. 1159-60).

It was Dr. Barrett's opinion that examination 34-944 would not meet professional standards of test development (A. 1160-61). The District Court agreed (A. 185-86).

Judge Lasker found of even greater import the fact that examination 34-944 failed to test several of the traits, skills and abilities that were identified by witnesses for both sides as crucial for success as a Correction Sergeant. Among these are leadership, empathy, understanding of the re-socialization process, ability to relate to people of different backgrounds and to treat them fairly, and ability to function in crisis situations (A. 311, 354, 457, 545, 938). By omitting consideration of these essential qualities, he concluded, the test performance does not reflect a true and fair estimate of the overall relative qualifications of candidates (A. 186).^{13/}

^{13/} Judge Newman, in Bridgeport, supra, held that an examination which had not been shown to sample the qualities necessary for successful performance could not meet the standard for job-relatedness, stating:

There has been no showing that the exam measures with proper relative emphasis all or even most of the essential areas of knowledge and the traits needed for proper job performance. Even if the exam need not be comprehensive as to content or constructs, the evidence does not indicate whether the few areas of knowledge and the few traits measured are the ones that will identify suitable candidates for the job of patrolman. This is not to doubt that arithmetic and reading comprehension are important for policeman. But without evidence, it cannot be determined whether this exam, in identifying those with skill in these areas, might not screen out others, somewhat but not seriously deficient in these areas, who would excel as policemen because of their talents in areas not tested for at all. An exam of this sort, which does not attempt to be comprehensive in testing for content or constructs, employs a sampling approach. Such an exam might, in some circumstances, be shown to meet the standard of job relatedness. But the evidence does not establish the representativeness of the knowledge or traits sampled by the exam used here. 354 F.Supp. at 792.

In their brief, defendants attempt to establish the job-relatedness of examination 34-944 by comparing various Sergeants' activities that were mentioned at trial or in individual post descriptions prepared at correctional facilities (A. 1788-1921) with the KS&A statements (A. 1332-36) (Br. 96-103). Such a comparison, they argue, shows that examination 34-944 tests for all the tasks a Sergeant performs. This argument must fail because there is no support for its underlying premises. First, there is nothing in the record to support the premise that the duties statements are accurate job descriptions. Siegal testified that the identity of the persons who prepared them was not known (A. 863). Just as with job audits there is no evidence of any guidelines or procedures followed in preparing them. Secondly, and more important, the record is similarly devoid of evidence to support the premise that the KS&A statements bear any relationship to examination 34-944. To the contrary, the District Court found that the KS&A statements were so lacking in detail as to serve no useful purpose and further, that they were not relied on in preparing the test (A. 177).

In view of the above, it is difficult to see how, on this record, the court below could have arrived at any conclusion other than that defendants failed to meet the burden of demonstrating job-relatedness of examination 34-944.

II. THE DISTRICT COURT'S DEFINITION OF
THE CLASS WAS NOT CLEARLY ERRONEOUS

Defendants' contention that the class should have been limited to Black Correction Officers at Ossining, based as it is on the argument that they are the only minorities with respect to which examination 34-944 had disparate impact, must fail with the rejection of that argument, (See pp. 16-18, supra.).

Defendants also claim that it was error to include in the class persons who passed the exam but scored too low to be appointed. The District Court's finding that the interests of such persons are identical to plaintiffs' interests (A. 199 n.15) is not clearly erroneous. Contrary to defendants' statements that the existence of such a class is speculative (Br. 109), there was undisputed evidence as to the number of persons to be appointed (see p. 10, supra); accordingly, the persons who ranked too low can be readily identified.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
IN ORDERING DEFENDANTS TO PREPARE A CRITERION-
VALIDATED EXAMINATION AND IN MANDATING APPOINT-
MENT RATIOS TO CURE EFFECTS OF PAST DISCRIMINATION

A. Applicable Legal Principles

This Court has recognized as "the basic tenet" in passing upon relief granted by a trial court in a case of this sort that

"the district court, sitting as a court of equity, has wide power and discretion to fashion its decree not only to prohibit present discrimination but to eradicate the effects of past discriminatory practices", Bridgeport, supra, 482 F.2d at 1340, citing Louisiana v. United States, 380 U.S. 145, 154 (1965) and United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, 413 (2d Cir.), cert. denied, 412 U.S. 939 (1973) ("Lathers"). In Vulcan, this Court, quoting International Salt Co. v. United States, 332 U.S. 392, 400 (1947), stated, "The framing of decrees should take place in the District rather than in the Appellate Courts". 490 F.2d at 399. Most recently, in Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622, 631 (1974) ("Rios"), this Court has reiterated its determination to leave the nature and extent of relief from past discrimination to the sound discretion of the trial judge.

The above cited cases are ample authority for the proposition that the determination of procedures to be used in developing a job-related test is confided to the lower court's sound discretion.

As to the promotional preferences mandated by the District Court, this Court has repeatedly affirmed relief of this type. In the private employment context, it has held that "while quotas to attain racial balance are

forbidden, quotas to correct past discrimination are not", Lathers, supra, 471 F.2d at 413. See also, Rios, supra, 501 F.2d at 629 and cases cited therein. It has noted with full approval that "Section 1983 cases have also granted relief by sanctioning quotas aimed at curing past discrimination," Bridgeport, supra, 482 F.2d at 1340. In each of the cited cases, this Court affirmed (in relevant part) rigorous decrees including preferential hiring requirements or quotas. The element that makes the affirmative provisions both lawful and necessary is proof of prior discrimination or its continuing effects. Louisiana v. United States, supra; Bridgeport, supra, 482 F.2d at 1340.

B. The Court Below Did Not Abuse Its Discretion In Requiring That New Job Selection Procedures Be Validated By Criterion-Related Techniques

The District Court's decree orders defendants to develop, in the shortest practicable time, a job selection procedure, which may include a written examination and/or other selection instruments (A. 242). The decree requires that before such a procedure is used for promotional purposes it must be validated, and that to the extent feasible, such validation studies must be performed by means of empirical,

criterion-related validation techniques (A. 242-43).^{14/} In arguing that this requirement constitutes error and abuse of discretion, defendants confuse the issues of liability and remedy. It is true that this Court has, at least in dictum, declared that a discriminatory selection procedure can be justified by other than a showing of criterion-related validity. Vulcan, supra, 490 F.2d at 395. However, since liability has been established, the trial court must fashion that relief which, on the facts of the case, appears most likely to right the wrong. Rios, supra, 501 F.2d at 631

^{14/} There are two forms of criterion-related validation, predictive and concurrent.

Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job-related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job.

Vulcan, supra, 360 F. Supp. at 1273. Both forms require the identification of criteria which indicate successful job performance and the matching of test scores with job performance ratings on the basis of the selected criteria to determine the degree of correlation between the two. Bridgeport, supra, 482 F.2d at 1337.

Decisions in this Circuit and the EEOC Guidelines agree that criterion-related validation is the best method of assuring job-relatedness of a selection procedure.

Bridgeport, supra, 482 F.2d at 1337 and 354 F.Supp. at 788; Vulcan, supra, 360 F.Supp. at 1273; 29 C.F.R. at §1607.5(a).

While this Court has observed that this form of validation may in some circumstances be difficult, Vulcan, supra, 490 F.2d at 395 and n.10, Judge Lasker's determination as to its appropriateness in this case is amply buttressed by the record.

Plaintiffs' expert, Dr. Barrett, testified that a number of agencies are developing predictively valid selection instruments for law enforcement field positions (A. 1178-80).

He described the methods by which defendants could begin to develop criterion-validated selection instruments for the Sergeant position, comparing the performance of the present provisional Sergeants with their scores on examinations 34-944 and ratings of their performance as Correction Officers ^{15/} (A. 1169-1173).

15/ Cf. Attica, The Official Report of the New York State Special Commission on Attica (1972), in a discussion of "the department as it exists, what the problems are", at p.26:

For promotion, evaluations of an officer's performance on the job and his ability to relate to inmates were not considered. Written examinations were the key, and after three years' service any Correction Officer could take an exam for Sergeant.

Kenneth Siegal indicated that if he had a free hand in developing a selection process for Correction Sergeant, he would develop a criterion-validated procedure (A. 957). Samuel Taylor testified that at least since early 1972 he has believed that criterion validation of the Correction Officers series of exams is feasible (A. 651). Indeed, the Department of Civil Service has a grant from the federal government under the Intergovernmental Personnel Act to develop criterion-validated selection procedures for this series, including the Sergeant job (A. 639-41, 1458-67).

Finally, defendants protestations of the inappropriate-ness (Br. 118) and burdensomeness (Br. 119-20) of the trial court's order must be viewed in the light of the State's adamant insistence on defending an examination which was proved to be woefully inadequate, to the extent of diverting "for well over a year" the resources of the Civil Service Department from the preparation of a criterion-validated selection device to the defense of this case (Br. 160, second footnote).

C. The Provisions Of The Decree For The Promotion Of Class Members Were Both Proper And Necessary As Part Of The Equitable Remedy

The District Court's decree mandates that at least one Black or Hispanic be appointed to the position of Correction

Sergeant (Male) for each three whites so appointed until the combined percentage of Black and Hispanics in that rank is equal to the combined percentage of Blacks and Hispanics in the rank of Correction Officer (Male) (A. 243-44). This requirement is fully justified by the facts of record and finds ample precedent in the decisions of this Court.

There is uncontroverted evidence that at least since 1961, there have been only two Blacks and no Hispanics permanently appointed to the rank of Sergeant or above in the entire New York State prison system (see pp. 7-8, supra). There is substantial un rebutted evidence that this startling disparity has been brought about by discriminatory, non-job-related Civil Service examinations. Of the 46 Blacks and Hispanics who took the 1970 Sergeant exam, not one passed (see pp. 10-11), supra). Named plaintiffs and five other Blacks testified they took the exam for Sergeant as many as four times and never scored high enough to be appointed (see pp. 13-14, supra). The record is silent as to the job-relatedness of the previous exams except for substantial evidence that they were cut from the same cloth as examination 34-944 (pp.13, 27-28, supra). The trial court found that "while there is evidence of the discriminatory impact of the earlier tests, there is no evidence as to their job-relatedness" (A. 181-82).

In view of the gross underrepresentation of minorities in the Sergeant rank brought about by past unlawful practices, as well as by examination 34-944, it was incumbent upon the court below to grant relief that would not only prohibit future discrimination but would also eliminate the effects of past violations; anything less would be "illusory and inadequate as a remedy." Rios, supra, 501 F.2d at 631.

In simple numerical terms the relief granted is eminently reasonable and far less than other courts have granted. In Bridgeport, this Court affirmed a quota for hiring that required 50% of the first ten vacancies, 75% of the next twenty, and 50% of some next subsequent vacancies to be awarded to minority group members. 354 F. ^{16/}Supp. 778, 798-799. In Lathers, this Court upheld an order requiring immediate issuance of 100 work permits to

^{16/} These numbers represent a hiring quota. This Court reversed the district judge's quota on promotions. The reversal was not based on any doubt that such a remedy, where appropriately supported, would be lawful and necessary. Rather, the Court's holding was grounded on the fact that the promotional examination had not been shown to be discriminatory. 482 F.2d at 1341

minority group persons, and a one-for-one quota on issuance of subsequent permits until 1975, 408 F.2d at 412. In Carter v. Gallagher 452 F.2d 315 (8th Cir. 1971 and rehearing en banc, 1972), an absolute preference (100%) was struck down but a one-for-two quota was substituted by the Court of Appeals, 452 F.2d at 331. In Commonwealth of Pennsylvania v. O'Neill, the Third Circuit upheld a one-for-two hiring order by an equally divided Court en banc, 348 F.Supp. 1084, 1105 (E.D. Pa. 1972), aff'd in pertinent^{17/} part, 473 F.2d 1029 (1973). These figures are in no way unusual, but rather reflect typical affirmative remedial provisions in recent decrees.

In Bridgeport this Court specifically enumerated the factors that persuaded it to approve Judge Newman's hiring quota. Because of the close similarity of the factual context of that action to the case at bar, we may apply the same factors to the present record.

First, the Court noted that

the defendants were employing an archaic test which was not validated and which . . .

^{17/} The district court's similar ratio for promotions was vacated. As in Bridgeport, the reason was a finding by the Court of Appeals that no promotional discrimination had been shown, 473 F.2d at 1031.

was not job related. Attacks by Blacks and other minorities upon examinations emphasizing verbal skills and not testing the professional skills of the vocation applied for, have been under increasing attack, and the failure here of the defendants to recognize the increasing evidence that tests of this type have an innate cultural bias, cannot be overlooked. 482 F.2d at 1340.

Examination 34-94; and other recent Sergeant examinations were also "archaic". They differed scarcely at all from past examinations, in spite of sweeping recent changes in what is expected of Sergeants (See pp. 13, 23, 28, supra). Not only should these defendants have been aware that they were using a hopelessly outmoded and discriminatory promotional procedure; they actually were. A. 1458-60.

Second, the Court of Appeals relied on the defendants' failure to undertake any affirmative steps to recruit minority personnel, 482 F.2d at 1340. Here, the record is utterly barren of any affirmative efforts of any nature to overcome discrimination.

Third and more important, the Court noted that the District Court had provided that the quota would be filled by "qualified Blacks and Puerto Ricans and not merely token personnel selected because of race and not qualification." 482 F.2d at 1341. This comment is also reflected in the Carter opinion, 452 F.2d at 331.

As in those cases, the lower court here has assured that persons who ultimately benefit from preferential promotional provisions are qualified by ordering the development of validated selection procedures.

Finally, the Court in Bridgeport noted with emphasis that

This is not a private employer and not simply an exercise in providing minorities with equal opportunity in employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement. 482 F.2d at 1341.

The same comment is equally forceful in the correctional field, which is of course a crucial aspect of the law enforcement system. The point is made more telling by the fact that in most of New York State's correctional facilities the inmate population ranges upward from 50% to over 80% Black and Hispanic (A. 1279). And we have become sadly aware of the dangers of a largely minority-group, urban inmate population controlled by almost exclusively white, rural corrections personnel. See generally, Attica: The Official Report Of The New York State Special Commission on Attica (Bantam, 1972).

In sum, plaintiffs submit that on the facts of the present case, the record fully justifies the affirmative relief granted by Judge Lasker.

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING PLAINTIFFS THEIR COSTS INCLUDING ATTORNEYS' FEES AGAINST DEFENDANTS.

Plaintiffs prevailed below on virtually every issue raised in this class action, which involves a question of great public importance. Finding that plaintiffs' victory had vindicated the public interest, the district court awarded them costs, including reasonable attorneys' fees, to be paid by the State defendants (A.190-A.196). The court below found such an award within its power and remedial discretion, although this action was not brought pursuant to a statute which expressly provides for such an award.^{18/}

Defendants attack this award as both constitutionally impermissible and an abuse of equitable discretion. Their challenge must be rejected on both grounds.

A. The Eleventh Amendment Does Not Bar the Award of Attorneys' Fees Against the State Defendants.

Defendants base their constitutional argument on the assumption that any award of costs which would be paid out of state funds violates the Eleventh Amendment. This Court has already rejected that assumption and the argument must therefore fall.

Defendants note that the named defendants, Oswald, Poston, Scelsi, and Stockmeister, were not, in their purely private capacities, brought within the court's jurisdiction (Br. 132).

^{18/} The court retained jurisdiction to receive evidence and determine the amount of the costs and reasonable attorneys' fees due plaintiffs, cf. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir. 1974).

Defendants concede, however, that those individuals were properly before the court in their representative capacities, as co-defendants of the two state agencies (Br. 144).^{19/} Defendants argue that since an award against them individually in their official capacities will be paid out of state funds within their control,^{20/} it is barred as against a sovereign (Br. 144).

In the past two years — particularly since Edelman v. Jordan, 39 L.Ed. 662 (1974) — the courts have frequently been

^{19/} Defendants have never contested the court's in personam jurisdiction over them in their official capacities. Shortly after suit was filed, the Attorney General accepted service for defendants on this basis, while declining to accept such service "to the extent they are sued individually" (A.82). In defendants' Answer filed July 10, 1973, they alleged, "[t]his Court lacks jurisdiction over defendants Poston, Scelsi, and Stockmeister insofar as they are named as defendants in other than their official capacity" (A.96). In an affidavit filed June 24, 1974, the Assistant Attorney General in charge of this case affirmed that,

at the hearing of the motion in chambers [May 24, 1973] your deponent advised the Court that she was authorized to waive service on behalf of the public agencies and the named defendants in their capacities as public officials but that she had no authority to waive service upon the natural defendants in their private capacities. (p.2)

* * *

...[A]ny participation of Mrs. Poston and Messrs. Preiser, Scelsi, and Stockmeister in the conduct of the lawsuit must be viewed as in defense of their official positions since that was the only capacity in which they could have been held liable. (p.6)

^{20/} The natural defendants are the highest officials of the two state agencies involved in this litigation. The court below assumed that the award would, in fact, be paid by state agencies (A.194-A.195). See also, Class v. Norton, ___ F.2d ___ (2nd Cir. No. 74-1702, October 10, 1974), slip op. at 90-91; Stolberg v. Members of the Board of Trustees for the State Colleges of Connecticut, 474 F.2d 485, 490 n.3 (2nd Cir. 1973); Gates v. Collier, 489 F.2d 298, 302 (5th Cir. 1973), reh. en banc granted.

asked to interpose the Eleventh Amendment as a jurisdictional bar to monetary awards against state defendants. Edelman and other authorities may cast substantial doubt on the constitutionality of awards of monetary damages or "retroactive benefits" against state defendants in some statutory contexts, see Class v. Norton, ___ F.2d ___ (2nd Cir. No. 74-1702, October 10, 1974), slip op. at 88-92. But this Court, like others, has refused to bar an award of costs including attorneys' fees even where they will be paid from state funds.

In Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974), an unemployment benefits action under 42 U.S.C. § 1983, this Court rejected a post-Edelman Eleventh Amendment challenge by state defendants to an attorneys' fee award. The Court held the Eleventh Amendment inapplicable to such a case because the award had only an "ancillary effect on the state treasury" which flowed from the necessary corrective injunctive relief, 496 F.2d at 651. This Court reaffirmed its position in Class v. Norton, supra, a welfare case, stating specifically that the "ancillary effects" doctrine exempts an award of costs including attorneys' fees from Edelman's proscription, slip op. at 90-91. Prior to the Edelman decision, this Court had reversed a district court's denial of attorneys' fees against state officials in a teacher's employment case under 42 U.S.C. § 1983, Stolberg v. Members of Board of Trustees for the State Colleges of Connecticut, 474 F.2d 485 (2nd Cir. 1973).

This Court's decision are firmly supported by Supreme Court authorities. Edelman v. Jordan, supra, teaches that an award

which has an "ancillary effect on the state treasury" is "a permissible and often inevitable consequence of the principle announced in Ex Parte Young, 209 U.S. 123 (1908)," 39 L.Ed.2d at 675. And the Court has held that a losing state defendant is liable for the costs of litigation, Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 77 (1927)^{21/}. Other courts, like this Circuit, have taken the Supreme Court authorities to permit attorneys' fee awards against state defendants,^{22/} although the question is not without difficulty.^{23/}

The courts have not been deterred by the fact that an award made nominally against a state official in his official capacity will as a practical matter be paid with state funds. On the contrary several, including this Court, have recognized that the real issue is not a mere game of semantics, but whether law-breaking state agencies will be required to bear some of the

^{21/} Plaintiffs were awarded attorneys' fees as part of the costs in this case (A.196), as is customary in discrimination cases, cf. 42 U.S.C. § 2000e-5(k) (employment discrimination, Title VII of Civil Rights Act of 1964); 42 U.S.C. § 2000a-3(b) (public accommodations, Title II, Civil Rights Act of 1964); 42 U.S.C. § 3612(c) (housing discrimination, Fair Housing Act of 1968); 20 U.S.C. § 1617 (discrimination in education, Emergency School Aid Act of 1972).

^{22/} Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) (3 judge court), aff'd 409 U.S. 942 (1972) (legislative reapportionment); Brandenburg v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare rights); Gates v. Collier, supra (prison conditions); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (voting rights); Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974) (welfare rights); cf. Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (prisoner rights).

^{23/} See, e.g., Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), cert. filed 43 L.W. 3296; Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017 (5th Cir. 1974), rehearing en banc granted; Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. filed 43 L.W. 3240; Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), cert. filed 43 L.W. 3281.

ancillary costs incurred in prospectively rectifying their policies. See cases cited at pp. 48-49, supra, and cf. Incarcerated Men of Allen County v. Fair, ___ F.2d ___ (6th Cir. No. 74-1052, November 13, 1974).

There is good reason for this Court to adhere to its "ancillary effects" doctrine here. Perhaps the most significant aspect of this case is plaintiffs' successful effort to require defendants to develop and utilize a non-discriminatory, job-related selection procedure for Correction Sergeants. This forward-looking remedy will doubtless entail significant expenditures from the state treasury and further tax the time and resources of plaintiffs and their counsel. The costs they incur in this effort are properly taxable as one part of the costs that must ultimately be borne by the state defendants in order to bring their practices into compliance with federal law.

B. The Award of Attorneys' Fees Was a Proper Exercise of the Court's Equitable Discretion.

The court below granted attorneys' fees as an exercise of its remedial discretion, in keeping with a growing line of authority approving such awards. The court relied on the "private attorney general" function fulfilled by plaintiffs to support the award in the absence of a specific statutory provision for allocation of costs.^{24/}

^{24/} This case was not brought under Title VII of the Civil Rights Act of 1964, which has an attorneys' fee provision, 42 U.S.C. § 2000e-5(k), for obvious reasons. Plaintiffs learned the results of examination 34-944 only on March 15, 1973 (A.17-A.18) and the appointments to Correction Sergeants were announced on or about April 4, 1973 (A.41). Suit was filed and a temporary

The Supreme Court has long recognized the power, as "part of the historic equity jurisdiction of the federal courts," to allow attorneys' fees where necessary "to do equity in a particular situation." Sprague v. Ticonic National Bank, 307 U.S. 161, 165-166 (1939). Thus, a court may award attorneys' fees not specifically authorized by statute or contractual agreement where "overriding considerations indicate the need for such a recovery," Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392 (1970), or when "the interests of justice so require," Hall v. Cole, 412 U.S. 1, 4-5 (1973). Such situations have long been recognized where the defendant unreasonably opposes or obstructs corrective litigation, and where the plaintiff confers a substantial benefit on class members and the costs can be spread among such beneficiaries, Hall v. Cole, *supra*, 412 U.S. at 5. Equitable awards are particularly appropriate where private litigants effectuate a Congressional purpose, see *id.* at 13-14,

24/ (cont'd)

restraining order necessary to preserve plaintiffs' rights obtained on April 10, 1973; the case was tried 103 days later (A.3-A.4). Under Title VII, at least 180 days (and in New York, ordinarily 300 days) would have to pass after initial filing of charges before plaintiffs could have brought suit. See 42 U.S.C. § 2000e-5(f)(1). Moreover, this Court has held that the Title VII administrative requirements need not be exhausted before suit is filed under 42 U.S.C. §§ 1981, 1983, Gresham v. Chambers, 501 F.2d 687 (2nd Cir. 1974).

In Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 497 F.2d 1113, 1115 (2nd Cir. 1973), *cert. filed* 43 L.W. 3282, this Court found some negative significance in the omission of an attorneys' fee provision from §§ 1981, 1983, in contrast to 42 U.S.C. § 2000e-5(k). *Contra*, Lee v. Southern Home Sites Corp., 444 F.2d 143, 145-147 (5th Cir. 1971); Fowler v. Schwartzwalder, 498 F.2d 145, 145-146 (8th Cir. 1974); *cf.* Fleischmann v. Maier Brewing Co., 386 U.S. 714, 719-721 (1967). But Bridgeport Guardians does not rule out attorneys' fees in the absence of specific statutory authorization; it only notes that absence in refusing to disturb a district court's exercise of discretion, see p. 53, *infra*.

Mills v. Electric Auto-Lite Co., supra, 396 U.S. at 396. One such area of paramount national concern in which attorneys' fees should be available to effectuate policy is the campaign to eradicate racial discrimination from our national life, Bradley v. School Board of the City of Richmond, 40 L.Ed.2d 476, 493 n.27 (1974).

The "private attorney general" rationale for fee awards, while more recently articulated than the "obdurate and obstinate" defendant doctrine or the "common benefit" theory, has found widespread acceptance. It holds that when a private litigant enforces a public law or policy at a cost to himself and brings about benefits to the public as a whole, he should recover his attorneys' fees. Such recovery is available regardless of the good or bad faith of the defense or the existence of a monetary fund created for the class. Recovery is designed to encourage and make financially possible such public-oriented litigation by private persons. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).^{25/}

This Court has never reversed a district judge's award of attorneys' fees based on the "private attorney general" rationale.

^{25/} In this public accommodations discrimination case, the Court noted,

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive power of the federal courts.

Id. at 402. Although Title II carries an attorneys' fee provision, 42 U.S.C. § 2000a-3(b), the same reasoning applies to the instant action under §§ 1981, 1983.

In Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 497 F.2d 1113 (2nd Cir. 1974), cert. filed 43 L.W. 3282, the Court affirmed a discretionary denial of attorneys' fees. It held, however, that:

While we do not rule out the possibility that counsel fees might be appropriate in some § 1983 cases, even absent statutory authority, we see no reason to reverse the determination below denying them.

497 F.2d at 1115. In Stolberg v. Members of Board of Trustees for the State Colleges of Connecticut, supra, 474 F.2d at 490, this Court in dictum adopted the reasoning behind the "private attorney general" standard. And in Jordan v. Fusari, supra, 496 F.2d at 650, the Court in remanding noted that the "private attorney general" standard "may well justify a judgment imposing reasonable attorneys' fees on defendant."

The Courts of Appeals for the First, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits have squarely adopted the "private attorney general" standard for public-interest cases in a wide variety of statutory and factual settings.^{26/}

^{26/} See, e.g., Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972) (housing discrimination, 42 U.S.C. § 1982); Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331, 1333-1334 (1st Cir. 1973) (environmental protection, 42 U.S.C. § 1857); Hoitt v. Vitek, 495 F.2d 219, 221 (1st Cir. 1974) (prisoner rights, 42 U.S.C. § 1983); Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972) (employment discrimination, 42 U.S.C. § 1981); Lee v. Southern Home Sites, 444 F.2d 143 (5th Cir. 1971) (housing discrimination, 42 U.S.C. § 1982); Fairley v. Patterson, supra (voting rights, 42 U.S.C. § 1973); Taylor v. Perini, supra, 503 F.2d at 905 (prisoner rights, 42 U.S.C. § 1983); Incarcerated Men of Allen County v. Fair, supra, slip op. at 5-6 (prison conditions, 42 U.S.C. § 1983); Milburn v. Huecker, supra, 500 F.2d at 1282 (welfare rights, 42 U.S.C. § 1983); Donahue v. Staunton, 471 F.2d 475, 483 (7th Cir. 1972), cert. denied 410 U.S. 955 (1973) (employment rights, 42 U.S.C. § 1983); Fowler v.

This case falls within the "private attorney general" rule. Plaintiffs have vindicated a public policy of the highest priority in eliminating unconstitutional and non-job-related barriers to minority employment by New York State. This achievement will immediately benefit several hundred Black and Hispanic Correction Officers, who may now fairly compete with their white colleagues for promotion. But plaintiffs have also conferred a benefit on the public at large, beyond the achievement of fair employment opportunities as an end in itself. The District Court noted

...the public's stake in establishing and maintaining a system of prison administration which is both competent and representative of the population. As members of the public, we include, of course, the inmates of the prison system who, more than anyone else in the community, are directly affected by the quality of correctional supervision.... (A.154).

Defendants are unable to cite a single appellate decision holding the award of attorneys' fees improper in such a case pursuant to the "private attorney general" standard. Instead, they urge the Court to blink at the reality of the entrenched discrimination they have practiced, and would continue to practice, until plaintiffs force them into compliance with law. Defendants'

26/ (cont'd)

Schwartzwalder, 498 F.2d 143, 145 (8th Cir. 1974) (employment discrimination, 42 U.S.C. §§ 1981, 1983); Brandenburger v. Thompson, 494 F.2d 885, 888-889 (9th Cir. 1974) (welfare rights, 42 U.S.C. § 1983); LaRaza Unida v. Volpe, 57 F.R.D. 94, 101-102 (N.D. Cal. 1972), aff'd 488 F.2d 559 (9th Cir. 1973) (relocation housing, 49 U.S.C. § 1653(f)); Wilderness Society v. Morton, 495 F.2d 1026, 1029-1031 (D.C. Cir. en banc 1974), cert. granted 43 L.W. 3208 (environmental protection, 42 U.S.C. § 4321). See also, Sims v. Amos, supra, 340 F. Supp. at 694 (legislative reapportionment, 42 U.S.C. § 1983).

In addition to the appellate decisions cited supra, see also the district court decisions cited by the court below at A.193-A.194.

arguments are inadequate on their face.^{27/}

The fact that plaintiffs are represented without fee by lawyers associated with a non-profit civil rights organization whose awards are channeled into further public-interest litigation is entirely irrelevant. This Court has dismissed such a contention as "singularly unimpressive," Jordan v. Fusari, supra, 496 F.2d at 649. All other Circuits that have ruled on the question are in accord. See, e.g., Natural Resources Defense Council v. Environmental Protection Agency, supra, 484 F.2d at 1338 n.7; Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538-539 (5th Cir. 1970); Clark v. American Marine Corp., 437 F.2d 959 (5th Cir. 1971), aff'g 320 F. Supp. 709, 711 (E.D. La. 1970); Fairley v. Patterson, 493 F.2d 598, 606-607 (5th Cir. 1974); Incarcerated Men of Allen County v. Fair, supra, slip op. at 7; Brandenburger v. Thompson, supra at 889.

^{27/} Defendants rely on (1) the "philosophy" of the New York State merit system (the implementation of which the Court held unconstitutional) (Br. 156-160); (2) the extraordinary assertion that plaintiffs' action did not vindicate any broad public interest (Br. 160-162); (3) the equally extraordinary presumption that private enforcement was unnecessary to secure compliance here (Br. 163-165); and (4) the absurd suggestion that the relatively tiny amount otherwise payable as costs would, if left with the State's other billions, more effectively catalyze amelioration of unlawful practices than if used to compensate plaintiffs for their costs (Br. 165-166).

V. THE INTERVENORS' ABSENCE FROM THIS CASE
UNTIL AFTER ISSUANCE OF THE DECISION
BELOW DOES NOT REQUIRE DISMISSAL.

The intervenors urge this Court, somewhat surprisingly, to dismiss this action because they did not become parties until after the entry of decision on the merits (Int. Br. 17-18^{28/}). A statement of the case as it involves intervenors, which is omitted from their brief, must preface a discussion of their arguments.

A. The Intervention Proceedings Below.

Intervenors first sought leave to intervene as defendants in this action on April 22, 1974 (A.201), over one year after this case was commenced, nine months after trial, and three weeks after entry of the decision below. Intervenors had, of course, known about the pendency and nature of the action since shortly after plaintiffs filed it.^{29/} Intervenors characterized themselves as defendants and filed an "Intervenors Answer" [sic] (A.210-20). The Answer included somewhat anomalously a "Prayer for Relief" seeking from the court affirmative injunctive

^{28/} Intervenors also, somewhat inconsistently, argue that the district court's remedy was an abuse of discretion and suggest their own preferred solutions (Int. Br. 27-48). To the extent that this argument raises substantive issues, they are dealt with in part III of this brief, pp. 35-45, supra.

^{29/} Both intervenors affirmed that the Department of Correctional Services told them of the case immediately after April 12, 1973 (A.202-03, A.205-06). Such was the notoriety of this "widely publicized" action among affected employees that Judge Lasker "took judicial notice that its contents have been well known to those who knew the facts" (A.234). Cf. Int. Br. 24.

remedies to intervenors' benefit (A.219-20).

The district court might properly have denied the intervention on timeliness grounds, NAACP v. New York, 413 U.S. 345, 365-368 (1973). Out of an abundance of fairness, the court permitted the intervention on July 15, 1974 (A.230, 237). It specified several conditions to the grant of intervention.^{30/} It precluded intervenors from relitigating issues which they might previously have raised but which had by then been decided, including whether examination 34-944 had any job-relatedness or predictive value as a measure of ability, and whether ratio promotions are a proper lawful remedy (A.231, 237). At the same time it rejected intervenors' request to represent a class of persons said to be "similarly situated" (A.231-32, 237). In denying intervenors class representative status, the court held the defendant class motion untimely and unnecessary (A.232-33). The court also denied intervenors' motion to add approximately 400 other persons who passed examination 34-944 as parties defendant (A.233-34, 238).

Throughout the proceedings from April 23, 1974 to the entry of judgment the district court accorded intervenors a careful hearing on all their arguments and assertions.^{31/} Indeed that

^{30/} The imposition of conditions was well within the court's discretion, Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 191-192 (2nd Cir. 1970); Advisory Committee's Note to Rule 24, 39 F.R.D. 69, 111 (1966).

^{31/} Prior to the July 15, 1974 hearing at which the district judge announced his rulings, another court hearing and several conferences in chambers were held with counsel for intervenors. At all times counsel urged, and the court weighed, broad arguments based on the interests of all persons affected by the court's actions (A.232).

consideration was evidently present even before intervenors formally joined the suit (A.153-54).

Intervenors in this Court seek to argue, as parties, several issues which the court below specifically precluded them from raising in this case.^{32/} The Court should disregard those arguments. It should also reject the intervenors' presumption that they may speak for others "similarly situated," despite the district court's denial of class action status and refusal to join 400 additional defendants on intervenors' request.^{33/} The elimination of those issues beyond the scope of the intervention reduces intervenors to a single position demanding scrutiny here: their argument that the entire case should be dismissed.

B. Intervenors' Absence From Pre-Decision Proceedings Is No Reason to Dismiss This Action.

Intervenors urge that Rule 19(b), F.R.C.P., requires dismissal of this case in its entirety. That rule provides,

If a person described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good

^{32/} See, e.g., Int. Br. 27-28, arguing that no past discrimination was shown here, cf. A.180-183 and pp. 41-42, supra; Int. Br. 28, asserting that the court's decree will cause promotion of "lower qualified minority members ... over better qualified whites," cf. A.183-186 and pp. 44-45, supra; Int. Br. 32, 34-35, claiming that examination 34-944 does measure job performance, cf. A.168-187 and pp. 20-34, supra; Int. Br. 29, stating remedial quotas violate Equal Protection, cf. A.41 and pp. 36-37, supra.

^{33/} The court below may have been troubled by the divergent interests within the purported class (e.g., those provisionally appointed based on 34-944 vs. those who passed but remained too far down the eligible list to be appointed). It doubted intervenors' "standing" to speak for others (A.233-34).

conscience the action should proceed among the parties before it, the absent person being thus regarded as indispensable.... ^{34/}

Rule 19(b) then specifies the four factors which will bear on the court's decision "in equity and good conscience." This rule is the product of a 1966 Amendment designed to eliminate the talismanic significance previously attributed to the status of absent parties deemed "indispensable," see Advisory Committee Note, 39 F.R.D. 69, 90-91 (1966). ^{35/}

The Supreme Court has exhaustively elucidated the meaning of Rule 19(b) as amended in Provident Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). The keys to that decision are its common-sense focus on the "equity and good conscience" test and its rejection of hard-and-fast semantically determined rules. Provident Bank requires a pragmatic approach to claims that absent "indispensable" parties require dismissal of actions.

^{34/} Rule 19(a) provides, in pertinent part,

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may ... (i) as a practical matter impair or impede his ability to protect that interest....

^{35/} The Supreme Court has recently expressed the opinion that, in the leading case of this former school of thought, Shields v. Barrow, 17 How. 130 (1855), it acted "perhaps unfortunately" in stating "general definitions of those persons without whom litigation could or could not proceed," Provident Bank & Trust Co. v. Patterson, 390 U.S. 102, 123-124 (1968).

The decision whether to dismiss (i.e., the decision whether the missing person is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.... To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter in the wrong way around: the court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him. 390 U.S. at 119.

See also, Schutten v. Shell Oil Co., 421 F.2d 869, 873-874 (5th Cir. 1969).

Under the approach dictated by Provident Bank, the Court must refuse to dismiss this case. All four factors cited in the rule and discussed in Provident Bank oppose dismissal. First, the judgment rendered in the absence of intervenors^{36/} is not prejudicial, in that it deprives them of no rights lawfully theirs, see pp. 61-62, infra. Second, the district court can shape the ultimate remedy—the Order and Decree of July 31, 1974 is merely an interim judgment which envisions further remedial steps—to accommodate intervenors' legitimate interests. Third, the judgment can be fully adequate without the joinder of 400 additional defendants.^{37/} Finally, if this action is dismissed plaintiffs and over 100 members of their class will be deprived

^{36/} It is not strictly correct to speak of intervenors as "absent" from the proceedings leading to judgment. They participated fully in all the steps after issuance of the memorandum decision leading to the court's formulation of the Order and Decree filed July 31, 1974, and were at that time full parties on their own motion.

^{37/} No other result is possible in light of the Supreme Court's explanation that this factor involves "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies" and considerations of the time and expense already invested in trial proceedings, Provident Bank, supra, 390 U.S. at 111.

of an adequate remedy. Dismissal would deprive all present minority provisional sergeants of their jobs and deprive all class members of an opportunity to compete on a non-discriminatory basis for the over 100 vacancies whose provisional occupants, chosen by test scores, would then receive permanent appointments. "Equity and good conscience" will not permit this result.

Intervenors' long delay in asserting their position must also weigh in the court's equitable determination. Intervenors chose to remain outside the litigation until an adverse decision was entered; then they tardily intervened only to seek to influence the remedial judgment. At no time before the appeal did they suggest dismissal; on the contrary, they seized on this action below as a vehicle for asserting their own cause of action against the original defendants (A.211-220). Courts of equity have not looked with favor on similar tactics in other intervention cases. See, e.g., Benger Laboratories Ltd. v. R. K. Laros Co., 24 F.R.D. 450, 453 (E.D. Pa. 1959), aff'd 317 F.2d 455 (3rd Cir. 1963), cert. denied 375 U.S. 833 (1963); Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F.2d 976, 979 (2nd Cir. 1939), cert. denied 308 U.S. 597 (1939); Rios v. Enterprise Association Steamfitters, Local 638, 8 EPD ¶9558 (S.D. N.Y. 1974); Patterson v. Newspaper and Mail Deliverers' Union, 8 EPD ¶9736 (S.D. N.Y. 1974). Intervenors' tactics are particularly inequitable in that the burden on them to protect their interests would not have been overwhelming, cf. Natural Resources Defense Council v. Tennessee Valley Authority, 340 F. Supp. 400 (S.D. N.Y. 1971), rev'd on other grounds 459 F.2d 255 (2nd Cir. 1971); Advisory

Committee's Note to Rule 19, 39 F.R.D. 69, 92 (1966).

The "rights" asserted by intervenors are not indefeasible property rights, as they repeatedly contend, but only expectancies. Neither intervenors nor any member of their purported class has ever held a permanent Correction Sergeant position; all their appointments were made provisional by order of the court below (A.61-65). The New York Civil Service Law specifically provides that the job rights of provisional appointees terminate as soon as regular permanent appointments are made, McKinney's New York Civil Service Law § 65 (1973). See Russell v. Hodges, 470 F.2d 212, 216-217 (2nd Cir. 1972) (provisional appointees have no "property" interest in continued employment)^{38/}. Cf. United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2nd Cir. 1971), ("[a]ssuming arguendo that the expectations of some employees will not be met, their hopes arise from an illegal system"); accord, Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971). The same logic precludes this Court from honoring the expectations derived by intervenors from an unconstitutional examination.

The court below could have properly proceeded without intervenors, particularly since this is a proceeding to enforce public rights. National Licorice Co. v. N.L.R.B., 309 U.S. 350, 365-366 (1940) (employees not indispensable parties to action to enjoin employer from enforcement of their contract rights as

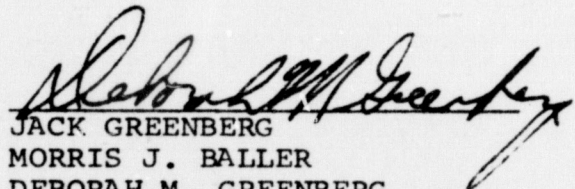
^{38/} Russell specifically rejects the intervenors' lengthy argument (Int. Br. 17-26) that their termination would violate due process by depriving them of liberty or property without a prior hearing.

illegal). It chose instead to let them participate before entering its judgment. This Court should require no more. The effect of the dismissal urged by intervenors would be to reinstate a racially discriminatory selection procedure and to require defendants, under state law, to appoint a generation of ^{39/} Correction Sergeants under federally unlawful standards. Instead, this Court should, by affirming, advance the day when defendants will adopt non-discriminatory selection procedures.

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,


JACK GREENBERG
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs-
Appellees

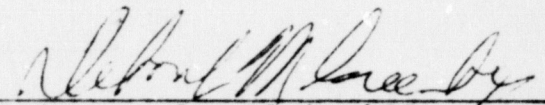
^{39/} Such a result would bring about the immediate or eventual appointment of approximately 157 white Correction Sergeants and just two minority persons (see p. 10, supra).

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of December, 1974, I served two copies of the Brief for Plaintiffs-Appellees upon the following counsel by United States Mail, postage pre-paid:

Hon. Louis J. Lefkowitz
Attorney General of the State
of New York
Judith A. Gordon, Esq.
Assistant Attorney General of
the State of New York
Two World Trade Center
New York, New York 10047

Richard R. Rowley, Esq.
Sneeringer & Rowley, P.C.
90 State Street
Albany, New York 12207


Attorney for Plaintiffs-
Appellees, Edward L. Kirkland
and Nathaniel Hayes